SUPREME COURT, U.S.
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1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 328

FOX TURKEY FARMS INC., A CORPORATION,
Petitioner,

vs.

FARMERS MUTUAL HAIL INSURANCE COMPANY OF IOWA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above cause.

OPINION BELOW

The opinion of the Court of Appeals dated April 27, 1962 is reported at 301 Fed. 2nd 697. Said opinion is set out in appendix hereto.

JURISDICTION

The date of judgment of the Court of Appeals is April 27, 1962.

A petition for rehearing, timely filed by petitioner, was denied by order of said Court on May 23, 1962.

Jurisdiction of this Court is invoked under 28 USC 1954 (1) and 2101 (C).

QUESTION PRESENTED

Where an oral contract of insurance is not reduced to writing but is intended by the parties to rest in parol, and policies are subsequently executed and delivered by insurer in part performance of the parol agreement and not for the purpose of putting said agreement in writing, may the reviewing court apply the parol evidence rule so as to exclude the establishment of the oral contract and hold that insured did not make out a submissible case in view of a jury's finding that the parties entered into the oral contract and that the policies were intended as mere part performance thereof?

STATEMENT

Petitioner, desirous of insuring its crop of turkeys to be raised in 1959, entered into an oral agreement with respondent to insure said turkeys for certain designated risks from the time they were placed on petitioner's farm in the Spring until they were marketed in the late Fall. Said turkeys were to be placed on the farm in five flocks on staggered dates over a period of several weeks. Some of them would be carried on the range after October 31, 1959 to secure greater weight. It was agreed that said insurance from placement to marketing was to be effected as follows:

Respondent's agent agreed:

1. To check with the farm manager as flocks were placed on the farm in the Spring to determine dates of placement and number of turkeys placed;
2. To issue a policy on each of the five flocks insuring said flock until October 31—a date established by trade custom in the geographical area;
3. To check with the farm manager on October 31 to ascertain the number of birds, if any, on the farm on said date;
4. To issue endorsements to the policies, for an additional premium; to insure said remaining birds for the customary two month period to December 31st.

Petitioner agreed:

1. To pay the "initial premium" within 30 days after receipt of invoices therefor;
2. To pay the premium for the endorsements in the normal course of business upon presentation of invoices.

Respondent's agent checked with the farm manager as flocks were placed and issued a policy on each of the five flocks placed running until October 31. Petitioner paid the premiums as agreed. Respondent's agent did not check with the farm manager on October 31st and did not issue endorsements to the policies to cover the remaining birds to December 31, 1959. On November 4th and 5th a snowstorm killed 8686 turkeys.

Respondent denied liability and petitioner sued in the Circuit Court of Codington County, South Dakota. Respondent removed to the United States District Court for the District of South Dakota on the basis of diversity of citizenship and an amount in controversy in excess of $10,000.00. The case was tried to a jury and a verdict returned for plaintiff in the sum of $34,797.32. No special interrogatories were propounded. The verdict was a general verdict. The following instruction (*inter alia*) was given:

> VII "If under these instructions and all of the evidence you find that the plaintiff has failed to prove the alleged oral contract for insurance, or if you find that the five insurance policies were the only insurance contracts between the parties, then your verdict should be for the defendant.
>
> But, if under these instructions and all the evidence, you find: (1) that the plaintiff and the defendant in the spring of 1959 did enter into the alleged oral contract for insurance on the turkeys until they were off the farm and dressed; (2) that the five policies were intended as partial performances only of the alleged oral contract, * * * then your verdict should be for plaintiff."

ARGUMENT.

THE DECISION BY THE COURT BELOW CONSTITUTES A RADICAL AND UNPRECEDENTED DEPARTURE FROM WELL ESTABLISHED AND UNIFORM LAW AND APPLIES THE PAROL EVIDENCE RULE SO AS TO FORECLOSE PETITIONER'S RIGHTS IN A VALID ORAL CONTRACT THE EXISTENCE OF WHICH WAS FOUND BY A JURY.

The holding by the Court below that an oral contract of insurance is merged into policies which were agreed upon as mere part performances of the oral contract, and not intended as written expressions of the contract, so as to bring into operation the parol evidence rule is a radical and unprecedented departure from well established principles of law. As such it calls for the supervision of this court to correct an error which sets an entirely new precedent in contract and insurance law.

The law governing the instant case is expressed in 10 R. C. L. 1019:

> "Where the parties have reduced an agreement to writing, the writing is supposed to contain all the agreement, and is the only evidence of it; and all prior or contemporaneous declarations and negotiations between the parties are excluded as evidence of the agreement, or any part of it. But where the agreement is not reduced to writing but is intended by the parties to rest in parol, the written instrument being subsequently executed in part execution of the parol agreement, and not for the purpose of putting that agreement in writing, it is well settled that an instrument thus executed does not supersede a prior parol agreement."

In a case which turned on the parol evidence rule, *Seitz* v. *Brewers' Refrigerating* Co., (1891) 141 U. S. 510, 35 L. Ed. 837, 12 S. Ct. 46, this Court stated, page 517:

> "Undoubtedly the existence of a separate oral agreement as to any matter on which a contract is silent, and which is not inconsistent with its terms may be proven by parol if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them."

The governing law of South Dakota is expressed in *Janssen* v. *Tuska*, 66 S.D. 604, 287 N.W. 501:

> "It is elementary that the parol evidence rule only has application—when the parties have adopted a writing or writings as the definitive expression or integration of their agreement."

More recently the Second Circuit in *Farmer* v. *Arabian Oil Co*, 227 Fed. 2nd, 46 applies the general rule:

> "In order for all prior negotiations to be completely embodied in a written agreement, the parties must intend such integration, and evidence *dehors* the writing is freely admitted to determine such intent."

In the instant case the oral agreement of the parties contemplated multiple performances on the part of the insurer in consideration for payment of premiums. These performances were ministerial acts, *viz.*, going out to a farm, ascertaining dates of placement and numbers of turkeys, writing policies and writing endorsements. These acts are such as do not usually find expression as provisions in an insurance policy. But the decision of the court below demands that such provisions be incorporated into the policies or lose their effect. That court held in substance that Respondent, after it issued the policy on the first flock, had

no further enforceable liability since the agreement to ascertain the dates of placement and numbers of succeeding flocks was not set forth in the first writing (policy). (Assuredly, if Respondent was not required to perform the acts required on October 31st if was not required to perform any of the other acts under the oral agr ement after the first policy was issued.)

We respectfully submit that the court below has completely misconstrued the theory of the case, applying the parol evidence rule to release Respondent from further agreed performances after its series of initial performances under the oral agreement evidenced to Petitioner that the whole agreement would be performed. The decision in effect allows an insurer to agree to a course of conduct, to embark on it and thence avoid further performance if such performance becomes onerous—in short the insurer is placed in *loco pœnitentiae*, able at any juncture to seek the refuge of the Rule.

If the holding of the reviewing court is allowed to stand every oral contract of insurance requiring multiple performances would seem to stand in jeopardy. Such decisions as *Trustees of Baptist Church* v. *Brooklyn Fire Insurance Co.*, 19 N. Y. 305; *Hawthorne* v. *German Alliance Insurance Co.*, 181 Ill. App. 88 and *Firemen's Fund Insurance Co. of San Francisco* v. *Searcy*, (Ky.) 163 S. W. 1103, cases almost identical to the one at bar, are rendered nugatory. An entirely new concept is grafted into the law of insurance contracts, *viz.*, that oral agreements preceding the issuance of a policy of insurance, even though dealing with matters not usually found in policies must be set out as endorsements to the policy or lose their effect. To correct such patent errors as this the supervision of this court is properly invoked.

CONCLUSION.

Wherefore, Petitioner prays that a Writ of *Certiorari* issue to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

DANIEL M. HEALY
ROSS H. OVIATT
Attorneys for Petitioner.

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 16,702, 16,703

Farmers Mutual Hail Insurance Company of Iowa,
Appellant,
vs.
Fox Turkey Farms, Inc.,
Appellee.
Fox Turkey Farms, Inc.,
Appellant,
vs.
Farmers Mutual Hail Insurance Company of Iowa,
Appellee.

Appeals from the United States District Court for the District of South Dakota.

[April 27, 1962.]

Before JOHNSEN, Chief Judge, and WOODROUGH and MATTHES, Circuit Judges.

PER CURIAM.

In this diversity case, which was tried on the theory that South Dakota law controls, we have two appeals presented. In No. 16,702, Farmers Mutual Hail Insurance

Company of Iowa has appealed from the judgment following verdict in favor of Fox Turkey Farms, Inc., on an alleged oral contract of insurance. Fox Farms filed a cross-appeal which presents the single question of whether it is entitled to interest on the amount of the judgment from the date of the loss of its property.

We conclude that a submissible case was not made by Fox Farms and that the court should have sustained motion of Farmers Mutual Hail Insurance Company for a directed verdict.[1] In view of this ruling consideration of appeal No. 16,703 is obviated. For the sake of brevity we will hereinafter refer to the parties as they were designated in the trial court.

At all times mentioned herein plaintiff was in the business of raising turkeys in large quantities. Defendant was in the business of insuring turkeys against death and destruction from various causes. Pursuant to oral negotiations in March or April, 1959, between Joseph Fox, Jr., president of plaintiff, and Clarence Grue, an agent of defendant, five policies of insurance were issued by the latter on April 21, 24, 28, May 1 and May 8, 1959. Each of the first four policies covered and insured 5,000 turkeys and the last or May 8 policy, insured 6,000 turkeys, or a total of 26,000.[2] Each policy was issued as a different lot of turkeys was placed on the premises of insured, thus accounting for the issuance of five policies; however, all policies expired and terminated on October 31, 1959, and none of them was renewed by written endorsement attached thereto. After the expiration date of the policies

[1] The trial judge obviously was concerned as to whether a case was made as he stated during arguments on motion for directed verdict: "I don't mind telling you the Court has been troubled throughout the trial of the case; there are some very close questions, exceedingly close."

[2] The policies insured the turkeys "against death as a direct result of or destruction made necessary by: fire and lightning * * * blizzard, * * * snow, sleet, * * *.

"This policy also covers huddling, piling, smothering, drowning or freezing only: as the immediate and direct result of a peril insured against coming in contact with the turkeys; * * *."

and on November 4 and 5, 1959, 8,686 turkeys of insured were killed or died as the result of the snowstorm and blizzard which struck the area where the turkeys were being kept and cared for. Although the coverage afforded by the policies had not been extended beyond October 31, 1959, plaintiff nevertheless made claim for the amount of its loss occurring on November 4 and 5 and eventually instituted this action to recover. The pleaded theory of plaintiff relied upon for recovery is:

> "That on or about March 31, 1959, plaintiff applied to the said Clarence Grue, * * * for the insurance of certain turkeys which were the property of plaintiff, * * * against death as a direct result of or destruction made necessary by * * * blizzard, snow, * * *. That the Company, by its said agent, in consideration of the premium to be paid to it by plaintiff, then and there agreed to insure the said stock of turkeys * * * and to execute and deliver to the plaintiff policies of insurance, insuring said stock of turkeys against loss or damage, for a period from the date of said policies until the turkeys were taken off for dressing. That notwithstanding that the Company, * * * agreed as aforesaid, that said policies would insure said * * * turkeys against loss or damage for a period from the date thereof until turkeys were taken off for dressing, the insurance policies so delivered to plaintiff purported to provide that the term of said insurance would expire on October 31, 1959; that by reason of the fact that the stock of turkeys consisted mostly of sexed toms; and that such toms would be held longer than the usual growth period to heavy weights, and furthermore, due to the fact that they were hatched at diverse dates, as indicated by the dates of said policies, a termination of the insurance on October 31, 1959, would not provide full coverage; that the company's said agent agreed thereto, and agreed that, at or before the said expressed termination date, the company would extend the expiration date to provide the coverage agreed to as aforesaid as was, and is the custom; * * *."

By answer defendant denied liability, alleging, *inter alia*, that its agent Grue was without authority to waive or change any part of the written contracts except by written endorsement issued by defendant and attached to the policies.

Over objection the court permitted Mr. Fox to testify at some length as to the negotiations which were antecedent to the issuance of the policies. The gist of this testimony which plaintiff relies upon as being sufficient to establish an oral contract of insurance, is summed up in this statement of the witness: "I told Mr. Grue that October 31st did not seem to be long enough and I, at that time, went over and reached for a calendar and proceeded to add 28 weeks from the time that I knew the approximate time the last birds would be on there, which would be the first week in May, and found these birds would not be ready for maturity until sometime in the end of November and one flock in the first part of December. * * * I then told Mr. Grue that I am not acquainted with the usual procedure on writing turkey insurance policies whereby you have an automatic October 31st date, but that Fox Turkey Farms is interested and wants the turkeys fully insured until the time that they leave the farm and are taken to the processing plant. Mr. Grue then stated 'I will take care of this'."

By the court's instructions the jury was informed that the issues were (1) did plaintiff and defendant in the spring of 1959 enter into an oral contract for insurance under which the defendant undertook and agreed to insure the plaintiff against turkey losses from the date of the issuance of the policies until the turkeys were taken off for dressing; (2) did they intend the conversation early in the spring of 1959 only as a preliminary, as contended by defendant, to the five insurance policies which thereafter were issued? A verdict was authorized for

plaintiff if the jury found (1) that plaintiff and defendant in the spring of 1959 entered into the alleged oral contract for insurance until the turkeys were off the farm and dressed; (2) that the five policies were intended as partial performance only of the alleged oral contract; and (3) if plaintiff had sustained a loss from the storm on November 4 and 5, 1959.

Basically, and stripped of non-essentials, the question for determination is a narrow one, and simply stated is: Were the antecedent negotiations and conversation of the parties (Fox and Grue) merged into the written agreement (insurance policies)? If so, then clearly there was no factual issue for the jury to resolve for indisputably the policies were lifeless and without effect when the loss occurred.

Resolution of the question brings into play the parol evidence rule, which has been the subject of much discussion by eminent text writers and by the courts. Contrary to the meaning reasonably deducible from its name, the parol evidence rule is not a rule of evidence but a rule of substantive law. *Eggers v. Eggers* (S.D.), 110 N.W. 2d 339, 341; *Dunlop Tire and Rubber Corp. v. Thompson*, 8 Cir., 273 F. 2d 396, 399; Williston on Contracts, 3d Ed., Vol. 4, § 631, p. 955; Corbin on Contracts, 1961 Ed., Vol. 3, § 573, p. 357. The very core of this rule is that all antecedent negotiations and conversations are deemed to have been merged into the written agreement of the parties, and it is presumed that the whole agreement was reduced to and embodied in the writing. The general rule is embodied in South Dakota Code, 1939, § 10.0604, in this language: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument," and the Supreme Court of South Dakota has

given effect to the rule as codified, in *Moncur* v. *Jones*, 31 N.W. 2d 759, 764, and *Kindley* v. *Williams*, 76 N.W. 2d 227, 229.

The parol evidence rule requires, "in the absence of fraud, duress, mutual mistake, or something of the kind, the exclusion of extrinsic evidence, oral or written, where the parties have reduced their agreement to an integrated writing. This does not preclude parol evidence from being introduced to prove the making of a contemporaneous contract *which does not cover the same ground as the integrated writing* * * *." (Italics supplied). Williston on Contracts, op. cit. pp. 949, 950. Appleman in his treatise on Insurance Law and Practice, Vol. 12, § 7205, p. 302, states, "Generally, oral negotiations or preliminary dealings are merged into * * * the policy itself when issued which supersedes all negotiations and expresses the final intention of the parties * * *." In *Dunlop Tire and Rubber Corp.* v. *Thompson*, *supra*, 273 F. 2d at p. 399, we stated: "In the absence of fraud or mistake, where a written contract is plain, unambiguous and complete in its terms, parol evidence may not be used to contradict, vary or add to any of its provisions. (Citing authorities)." In *Stoefen* v. *Brooks*, 287 N.W. 330, at p. 332, the Supreme Court of South Dakota declared that "* * * parol testimony is inadmissible to vary, contradict or add to a contract which has been reduced to writing which is clear, definite and complete, and * * * in the absence of fraud, mistake or accident, it will be presumed that the written agreement expresses the final intention of the parties upon the subject matter of the contract." See also *Moncur* v. *Jones*, *supra*, 31 N.W. 2d 759; *Vaughn* v. *Rosencrance* (S.D.), 38 N.W. 2d 822; *Kindley* v. *Williams*, *supra*, 76 N.W. 2d 227.

Plaintiff recognizes and adheres to the foregoing principles. It concedes that all terms and conditions of the

policies, including the expiration date, were valid and in accordance with the prior understanding of the parties but it claims that "in effect two parol agreements were entered into in the spring of 1959, one of which was performed by the issuance of the policies and one of which was executory as to the extensions." The fatal weakness of this ingenious theory becomes obvious when all the facts and circumstances are considered and viewed in light of the controlling law.

The evidence conclusively establishes that only *one* agreement emerged from the conversation between plaintiff's president Fox and agent Grue which took place in March or April, 1959. As we have seen, the negotiations then carried on were centered around and focused upon *one* subject—insurance covering plaintiff's turkeys from the time they were placed on the farm until they were removed therefrom. Pursuant to such negotiations valid written contracts, free from fraud, duress, mistake, ambiguity or other legal infirmity were entered into. These contracts or policies insured the turkeys for a term ending October 31, 1959. Among other provisions contained therein § 14 thereof provided: " * * * nor shall the terms of this policy be waived or changed, *except by endorsement issued to form a part of this policy.*" (Italics supplied). Thus by the plain terms of the policies, conceded by plaintiff to be valid in every detail, the only method by which the policies could be extended beyond October 31 was by endorsement attached thereto. This is precisely the course that was pursued during the previous year when defendant had issued a larger number of policies insuring approximately 75,000 turkeys, the property of plaintiff. Upon the expiration date of October 31, 1958, one of the policies was extended by *written endorsement attached thereto.* Moreover, from Fox's testimony, it is clearly demonstrated that he fully understood that if in

surance was required beyond October 31, 1959, it was to be provided in accordance with the policy terms, *i.e.*, by written endorsement. Concerning the negotiations prior to the issuance of the policies, Fox's testimony was: "I asked Mr. Grue to be sure and check at the farm at the time of expiration of these [policies] *before he wrote the extensions* to find out exactly how many turkeys would be left on the farm at that time, and *write the extensions for those left.*" (Italics supplied). Likewise, on the day that Fox learned of the loss, he contacted Grue by telephone and asked him "if he had been out to the farm and knew about our losses out there and he said he knew about the storm. * * * I asked him at that time whether or not he had *sent out the notices on the extension for the insurance* and he stated that he did not know." (Italics supplied).

In summary, we hold that all of the prior negotiations relied upon in part by plaintiff as constituting a separate and enforceable oral contract, were by law merged into the policies. Since by the plain terms thereof any extension beyond the expressed termination date had to be in writing and attached to the policies, plaintiff is prohibited from recovering on the theory of an antecedent oral contract of insurance. Whether in fact there was such a contract is legally irrelevant in light of the parol evidence rule.

The judgment is

REVERSED.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

JUDGMENT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1961.

Farmers Mutual Hail Insurance Company of Iowa, Appellant,
No. 16702.
vs.
Fox Turkey Farms, Inc., Appellee.

Appeal from the United States District Court for the District of South Dakota.

— and —

Fox Turkey Farms, Inc., Appellant,
No. 16703. vs.
Farmers Mutual Hail Insurance Company of Iowa, Appellee.

Appeal from the United States District Court for the District of South Dakota.

These causes came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the District

Court be, and the same is hereby, reversed with costs, and that the Farmers Mutual Hail Insurance Company of Iowa have and recover against Fox Turkey Farms, Inc., the sum of Twenty-five Dollars, Clerk's docketing fee in this Court, and the sum of Two Hundred Twenty and no/100 ($220.00) Dollars, the cost of printing the record in these causes, making a total of Two Hundred Forty-five and no/100 ($245.00) Dollars, for its costs in this behalf expended, and have execution therefor.

And it is further Ordered by this Court that these causes be, and the same are hereby, remanded to the said District Court for proceedings not inconsistent with the opinion of the Court this day filed herein.

[April 27, 1962.]

APPENDIX C

PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1961.

No. 16702. Farmers Mutual Hail Insurance Company of Iowa, Appellant, vs. Fox Turkey Farms, Inc.	Appeal from the United States District Court for the District of South Dakota.
No. 16703. Fox Turkey Farms, Inc., vs. Farmers Mutual Hail Insurance Company of Iowa.	Appeal from the United States District Court for the District of South Dakota.

Petition of Fox Turkey Farms, Inc., appellee in No. 16702 and appellant in No. 16703, for rehearing filed in these causes having been considered, it is now here ordered that the same be, and it is hereby, denied.

[May 23, 1962.]